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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

The Court recognizes that at least some of the documents and information being sought through discovery in the above-captioned action are, for competitive reasons, normally kept confidential by the parties. The parties have submitted a Joint Motion for Protective Order and have agreed to be bound by its terms in this action. The Court hereby GRANTS the parties' Joint Motion for Protective Order and ENTERS the Protective Order as follows:

## DEFINITIONS

1. The term "Confidential Information" shall mean and include information contained or disclosed in any materials, including documents, portions of documents, answers to interrogatories, responses to requests for admissions, trial testimony, deposition testimony, and transcripts of trial

testimony and depositions, including data, summaries, and compilations derived therefrom that is deemed to be Confidential Information by any party to which it belongs.

2. The term "materials" shall include, but shall not be limited to: documents; correspondence; memoranda; bulletins; blueprints; specifications; customer lists or other material that identify customers or potential customers; price lists or schedules or other matter identifying pricing; minutes; telegrams; letters; statements; cancelled checks; contracts; invoices; drafts; books of account; worksheets; notes of conversations; desk diaries; appointment books; expense accounts; recordings; photographs; motion pictures; compilations from which information can be obtained and translated into reasonably usable form through detection devices; sketches; drawings; notes (including laboratory notebooks and records); reports; instructions; disclosures; other writings; models and prototypes and other physical objects.

3. The term "counsel" shall mean outside counsel of record, and other attorneys, paralegals, secretaries, and other support staff employed in the law firms identified below:

- HELLER EHRMAN LLP, 4350 La Jolla Village Drive, 7th Floor, San Diego, CA 92122-1246
- McDERMOTT WILL & EMERY LLP, 3150 Porter Drive, Palo Alto, CA 94304.

## GENERAL RULES

4. Each party to this litigation that produces or discloses any materials, answers to interrogatories, responses to requests for admission, trial testimony, deposition testimony, and transcripts of trial testimony and depositions, or information that the producing party believes should be subject to this Protective Order may designate the same as "CONFIDENTIAL" or "CONFIDENTIAL - FOR COUNSEL ONLY."

(a) Designation as "CONFIDENTIAL": Any party may designate information as "CONFIDENTIAL" only if, in the good faith belief of such party and its counsel, the unrestricted disclosure of such information could be potentially prejudicial to the business or operations of such party.

(b) Designation as "CONFIDENTIAL - FOR COUNSEL ONLY": Any party may designate information as "CONFIDENTIAL - FOR COUNSEL ONLY" only if, in the good faith belief of such party and its counsel, the information is among that considered to be most sensitive by the party, including but not limited to trade secret or other confidential research, development, financial or other commercial information.

5. In the event the producing party elects to produce materials for inspection, no marking need be made by the producing party in advance of the initial inspection. For purposes of the initial inspection, all materials produced shall be considered as "CONFIDENTIAL - FOR COUNSEL ONLY," and shall be treated as such pursuant to the terms of this Order. Thereafter, upon selection of specified materials for copying by the inspecting party, the producing party shall, within a reasonable time prior to producing those materials to the inspecting party, mark the copies of those materials that contain Confidential Information with the appropriate confidentiality marking.

6. Whenever a deposition taken on behalf of any party involves a disclosure of Confidential Information of any party:

(a) said deposition or portions thereof shall be designated as containing Confidential Information subject to the provisions of this Order; such designation shall be made on the record whenever possible, but a party may designate portions of depositions as containing Confidential Information after transcription of the proceedings; a party shall have until fifteen (15) days after receipt of the deposition transcript to inform the other party or parties to the action of the portions of the transcript designated "CONFIDENTIAL" or "CONFIDENTIAL - FOR COUNSEL ONLY;"

(b) the disclosing party shall have the right to exclude from attendance at said deposition, during such time as the Confidential Information is to be disclosed, any person other than the deponent, counsel (including their staff and associates), the court reporter, and the person(s) agreed upon pursuant to paragraph 9 below; and

(c) the originals of said deposition transcripts and all copies thereof shall bear the legend "CONFIDENTIAL" or "CONFIDENTIAL - FOR COUNSEL ONLY," as appropriate, and the original or any copy ultimately presented to a court for filing shall not be filed unless it can be

1 accomplished under seal, identified as being subject to this Order, and protected from being opened  
2 except by order of this Court.

3       7. All Confidential Information designated as "CONFIDENTIAL" or "CONFIDENTIAL -  
4 FOR COUNSEL ONLY" shall not be disclosed by the receiving party to anyone other than those  
5 persons designated herein and shall be handled in the manner set forth below and, in any event, shall  
6 not be used for any purpose other than in connection with this litigation, unless and until such  
7 designation is removed either by agreement of the parties, or by order of the Court.

8       8. Information-designated "CONFIDENTIAL - FOR COUNSEL ONLY" shall be viewed  
9 only by counsel (as defined in paragraph 3) of the receiving party, and by independent experts under  
10 the conditions set forth in this Paragraph. The right of any independent expert to receive any Confidential  
11 Information shall be subject to the advance approval of such expert by the producing party or by  
12 permission of the Court. The party seeking approval of an independent expert shall provide the  
13 producing party with the name and curriculum vitae of the proposed independent expert, and an  
14 executed copy of the form attached hereto as Exhibit A, in advance of providing any Confidential  
15 Information of the producing party to the expert. Any objection by the producing party to an independent  
16 expert receiving Confidential Information must be made in writing within five (5) business days  
17 following receipt of the identification of the proposed expert. Confidential Information may be  
18 disclosed to an independent expert if the five (5) business day period has passed and no objection has  
19 been made. The approval of independent experts shall not be unreasonably withheld.

21       9. Information designated "CONFIDENTIAL" shall be viewed only by counsel (as defined  
22 in paragraph 3) of the receiving party, by independent experts (pursuant to the terms of paragraph 8),  
23 and by the additional individuals listed below, provided each such individual has read this Order in  
24 advance of disclosure and has agreed in writing to be bound by its terms:

25           (a) Executives who are required to participate in policy decisions with reference to  
26 this action;

27           (b) Technical personnel of the parties with whom Counsel for the parties find it  
28 necessary to consult, in the discretion of such counsel, in preparation for trial of this

1 action; and  
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3 (c) Stenographic and clerical employees associated with the individuals identified  
4 above.

5 10. With respect to material designated "CONFIDENTIAL" or "CONFIDENTIAL - FOR  
6 COUNSEL ONLY," any person indicated on the face of the document to be its originator, author or a  
7 recipient of a copy thereof, may be shown the same regardless of whether they are an identified as  
8 being allowed access to the document under either of paragraphs 8 or 9 above.

9 11. All information which has been designated as "CONFIDENTIAL" or "CONFIDENTIAL - FOR  
10 COUNSEL ONLY" by the producing or disclosing party, and any and all reproductions  
11 thereof, shall be retained in the custody of the counsel for the receiving party identified in paragraph 3,  
12 except that independent experts authorized to view such information under the terms of this Order may  
13 retain custody of copies such as are necessary for their participation in this litigation.

14 12. Before any materials designated as Confidential Information (including materials  
15 produced in discovery, answers to interrogatories, responses to requests for admissions, deposition  
16 transcripts, or other documents) are filed with the Court for any purpose, the party seeking to file such  
17 material shall first seek permission from the disclosing party to file such materials with the Court.  
18 Should the disclosing party feel that the materials in issue continue to need protection, the party  
19 seeking to file such material must seek permission of the Court to file said material under seal. The  
20 parties will follow and abide by applicable law, including Civ. L.R. 7.3, with respect to filing  
21 documents under seal in this Court.

22 13. At any stage of these proceedings, any party may object to a designation of the materials  
23 as Confidential Information. The party objecting to confidentiality shall notify, in writing, counsel for  
24 the designating party of the objected-to materials and the grounds for the objection. If the dispute is not  
25 resolved consensually between the parties within seven (7) business days of receipt of such a notice of  
26 objections, the objecting party may move the Court for a ruling on the objection. The materials at issue  
27 shall be treated as Confidential Information, as designated by the designating party, until the Court has  
28 ruled on the objection or the matter has been otherwise resolved.

1       14. All Confidential Information shall be held in confidence by those inspecting or  
2 receiving it, and shall be used only for purposes of this action. Counsel for each party, and each person  
3 receiving Confidential Information shall take reasonable precautions to prevent the unauthorized or  
4 inadvertent disclosure of such information. If Confidential Information is disclosed to any person other  
5 than a person authorized by this Order, the party responsible for the unauthorized disclosure must  
6 immediately bring all pertinent facts relating to the unauthorized disclosure to the attention of the other  
7 parties and, without prejudice to any rights and remedies of the other parties, make every effort to  
8 prevent further disclosure by the party and by the person(s) receiving the unauthorized disclosure.  
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10      15. No party shall be responsible to another party for disclosure of Confidential Information  
11 under this Order if the information in question is not labeled or otherwise identified as such in  
12 accordance with this Order.

13      16. If a party, through inadvertence, produces any Confidential Information without  
14 labeling or marking or otherwise designating it as such in accordance with this Order, the designating  
15 party may give written notice to the receiving party that the document or thing produced is deemed  
16 Confidential Information, and that the document or thing produced should be treated as such in  
17 accordance with that designation under this Order. The receiving party must treat the materials as  
18 confidential, once the designating party so notifies the receiving party. If the receiving party has  
19 disclosed the materials before receiving the designation, the receiving party must notify the designating  
20 party in writing of each such disclosure. Counsel for the parties shall agree on a mutually acceptable  
21 manner of labeling or marking the inadvertently produced materials as "CONFIDENTIAL" or  
22 "CONFIDENTIAL - FOR COUNSEL ONLY" - SUBJECT TO PROTECTIVE ORDER.

23      17. If information is produced in discovery that is subject to a claim of privilege or of  
24 protection as trial-preparation material, the party making the claim may notify any party that received  
25 the information of the claim and the basis for it. The parties have agreed that any such inadvertent  
26 production of privileged or protected material does not act as an automatic waiver of the privilege or  
27 protection. After being notified, a party must promptly return, sequester, or destroy the specified  
28 information and any copies it has and may not use or disclose the information until the claim is

1 resolved. A receiving party may promptly present the information to the court under seal for a  
2 determination of the claim. If the receiving party disclosed the information before being notified, it  
3 must take reasonable steps to retrieve it. The producing party must preserve the information until the  
4 claim is resolved.

5 18. Nothing herein shall prejudice the right of any party to object to the production of any  
6 discovery material on the grounds that the material is protected as privileged or as attorney work  
7 product.

8 19. Nothing in this Order shall bar counsel from rendering advice to their clients with  
9 respect to this litigation and, in the course thereof, relying upon any information designated as  
10 Confidential Information, provided that the contents of the information shall not be disclosed.

11 20. This Order shall be without prejudice to the right of any party to oppose production of  
12 any information for lack of relevance or any other ground other than the mere presence of Confidential  
13 Information. The existence of this Order shall not be used by either party as a basis for discovery that is  
14 otherwise improper under the Federal Rules of Civil Procedure.

15 21. Nothing herein shall be construed to prevent disclosure of Confidential Information if  
16 such disclosure is required by law or by order of the Court.

17 22. Upon final termination of this action, including any and all appeals, counsel for each  
18 party shall, upon request of the producing party, return all Confidential Information to the party that  
19 produced the information, including any copies, excerpts, and summaries thereof, or shall destroy same  
20 at the option of the receiving party, and shall purge all such information from all machine-readable  
21 media on which it resides. Notwithstanding the foregoing, counsel for each party may retain all  
22 pleadings, briefs, memoranda, motions, and other documents filed with the Court that refer to or  
23 incorporate Confidential Information, and will continue to be bound by this Order with respect to all  
24 such retained information. Further, attorney work product materials that contain Confidential  
25 Information need not be destroyed, but, if they are not destroyed, the person in possession of the  
26 attorney work product will continue to be bound by this Order with respect to all such retained  
27 information.

1       23. The restrictions and obligations set forth herein shall not apply to any information that:  
2 (a) the parties agree should not be designated Confidential Information; (b) the parties agree, or the  
3 Court rules, is already public knowledge; (c) the parties agree, or the Court rules, has become public  
4 knowledge other than as a result of disclosure by the receiving party, its employees, or its agents in  
5 violation of this Order; or (d) has come or shall come into the receiving party's legitimate knowledge  
6 independently of the production by the designating party. Prior knowledge must be established by  
7 production documentation.

8       24. The restrictions and obligations herein shall not be deemed to prohibit discussions of  
9 any Confidential Information with anyone if that person already has or obtains legitimate possession  
10 thereof.

11       25. Transmission by facsimile is acceptable for all notification purposes herein.

12       26. This Order may be modified by agreement of the parties, subject to approval by the  
13 Court.

14       27. The Court may modify the terms and conditions of this Order for good cause, or in the  
15 interest of justice, or on its own order at any time in these proceedings. The parties prefer that the  
16 Court provide them with notice of the Court's intent to modify the Order and the content of those  
17 modifications, prior to entry of such an order.

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19       IT IS SO ORDERED.

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22       DATED: January 29, 2008

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26       Hon. Anthony J. Battaglia

27       U.S. Magistrate Judge

28       United States District Court

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